



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 17

RIN 2900-AO58

Copayments for Medications in 2013

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, without change, an interim final rule amending the Department of Veterans Affairs (VA) medical regulations to freeze the copayments required for certain medications provided by VA until December 31, 2013. Under that rule, the copayment amounts for all enrolled veterans were maintained at the same rates as they were in 2012, which were \$8 for veterans in priority groups 2-6 and \$9 for veterans in priority groups 7 and 8. On January 1, 2014, the copayment amounts may increase based on the prescription drug component of the Medical Consumer Price Index (CPI-P).

DATES: Effective Date: This rule is effective on [insert date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Kristin Cunningham, Director, Business Policy, Chief Business Office, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-1599. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On December 31, 2012, VA published in the Federal Register (77 FR 76865) an interim final rule that froze copayments required for certain medications provided by VA until December 31, 2013.

Under 38 U.S.C. 1722A(a), VA must require veterans to pay a \$2 copayment for each 30-day supply of medication furnished on an outpatient basis for the treatment of a non-service-connected disability or condition unless a veteran has a service-connected disability rated 50 percent or more, is a former prisoner of war, or has an annual income at or below the maximum annual rate of VA pension that would be payable if the veteran were eligible for pension. Under 38 U.S.C. 1722A(b), VA “may,” by regulation, increase that copayment amount and establish a maximum annual copayment amount (a “cap”). We have consistently interpreted section 1722A(b) to mean that VA has discretion to determine the appropriate copayment amount and annual cap amount for medication furnished on an outpatient basis for covered treatment, provided that any decision by VA to increase the copayment amount or annual cap amount is the subject of a rulemaking proceeding. We have implemented this statute in 38 CFR 17.110.

Under 38 CFR 17.110(b)(1), veterans are obligated to pay VA a copayment for each 30-day or less supply of medication provided by VA on an outpatient basis (other than medication administered during treatment). Under the regulation as amended by the interim final rule published on December 31, 2012, 77 FR 76865, for the period from July 1, 2010, through December 31, 2013, the copayment amount for veterans in priority categories 2 through 6 of

VA's health care system is \$8. 38 CFR 17.110(b)(1)(ii). Thereafter, the copayment amount for all affected veterans will be established using a formula based on the prescription drug component of the CPI-P, set forth in 38 CFR 17.110(b)(1)(iv). For veterans in priority categories 7 and 8, the copayment amount from July 1, 2010, through December 31, 2011, was \$9. 38 CFR 17.110(b)(1)(iii). After December 31, 2011, copayments for veterans in priority categories 7 and 8 were subject to the regulatory formula; however, that formula did not trigger an increase in the copayment amount, so it remains \$9.

Current § 17.110(b)(2) also includes a “cap” on the total amount of copayments in a calendar year for a veteran enrolled in one of VA’s health care enrollment system priority categories 2 through 6. As a result of the interim final rule, the annual cap is set at \$960 through December 31, 2013. Thereafter, the cap is to increase “by \$120 for each \$1 increase in the copayment amount” applicable to veterans enrolled in one of VA’s health care enrollment system priority categories 2 through 6.

VA invited interested persons to submit comments on the interim final rule on or before March 1, 2013, and we received one comment. The commenter suggested that VA should not charge veterans a medication copayment. No changes are made based on this comment. With certain statutory exceptions set forth in 38 CFR 17.110(c), the provisions of 38 U.S.C. 1722A require veterans to pay a copayment for each 30-day or less supply of medication furnished on an outpatient basis for the treatment of a non-service-connected disability or

condition. VA has no authority to exempt veterans from this statutory requirement.

At the end of calendar year 2013, unless additional rulemaking is initiated, VA will once again use the CPI-P methodology in § 17.110(b)(1)(iv) to determine whether to increase copayments and calculate any mandated increase in the copayment amount for veterans in priority categories 2 through 8. At that time, the CPI-P as of September 30, 2013, will be divided by the index as of September 30, 2001, which was 304.8. The ratio will then be multiplied by the original copayment amount of \$7. The copayment amount of the new calendar year will be rounded down to the whole dollar amount. As mandated by current § 17.110(b)(2), the annual cap will be calculated by increasing the cap by \$120 for each \$1 increase in the copayment amount. Any change in the copayment amount and cap, along with the associated calculations explaining the basis for the increase, will be published in a Federal Register notice.

Therefore, based on the rationale set forth here and in the interim final rule, VA is adopting the provisions of the interim final rule as a final rule with no changes.

Administrative Procedure Act

In accordance with 5 U.S.C. 553(b)(B) and (d)(3), the Secretary of Veterans Affairs concluded that there was good cause to dispense with the opportunity for advance notice and opportunity for public comment and good cause to publish this rule with an immediate effective date. The Secretary found

that it was impracticable and contrary to the public interest to delay this rule for the purpose of soliciting advance public comment or to have a delayed effective date. Increasing the copayment amount on January 1, 2013, might have caused a significant financial hardship for some veterans.

Effect of Rulemaking

Title 38 of the Code of Federal Regulations, as revised by this final rulemaking, represents VA's implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance must be read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving

Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action,” which requires review by the Office of Management and Budget (OMB), as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more

(adjusted annually for inflation) in any given year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This final rule will temporarily freeze the copayments that certain veterans are required to pay for prescription drugs furnished by VA. This final rule affects individuals and has no impact on small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program number and title for this rule are as follows: 64.005, Grants to States for Construction of State Home Facilities; 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.012, Veterans Prescription Service; 64.013, Veterans Prosthetic Appliances; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.016, Veterans State Hospital Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.022, Veterans Home

Based Primary Care; and 64.024, VA Homeless Providers Grant and Per Diem Program.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Jose D. Riojas, Interim Chief of Staff, approved this document on May 14, 2013, for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs-health, Grant programs-veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting and recordkeeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans.

Dated: May 20, 2013

Robert C. McFetridge,
Director, Regulation Policy and Management,
Office of the General Counsel,
Department of Veterans Affairs.

PART 17 – MEDICAL

Based on the rationale set forth in the interim final rule published in the Federal Register at 77 FR 76865 on December 31, 2012, and in this document, VA is adopting the provisions of the interim final rule as a final rule with no changes.

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